



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 15, 1996

Ms. Mab Fitz-Gerald
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR96-0719

Dear Ms. Fitz-Gerald:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39611.

The Texas Appraiser and Licensing Board (the "board"), which you represent, received a request for the entire file of a specific real estate appraiser. You assert that the results of the appraiser's licensing examination are confidential under section 552.101. You also assert that certain information is excepted from disclosure under section 552.103. You have provided this office with a copy of the information that is at issue.

First, you claim that the results of the appraiser's examination are excepted from disclosure under section 552.101 of the Government Code. This section excepts information that is considered to be "confidential by law, either constitutional, statutory, or by judicial decision." Section 10(f) of article 6573a.2, V.T.C.S., provides that the results of the appraiser examination are confidential. Thus, we conclude that the results of the appraiser examination that you have marked, including the examination scantron sheet, are confidential under this provision.

You also assert that certain information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). For purposes of section

552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA).

You advise us that the board has received a complaint and is currently conducting an investigation that may result in settlement or litigation. Pursuant to section 12 of article 6573a.2, V.T.C.S., on receipt of a complaint, the board is authorized to conduct an investigation and may initiate a contested case hearing under the APA if probable cause exists. We therefore conclude that you have established that litigation is reasonably anticipated. Additionally, the documents you submitted that specifically indicate on their face that they are related to this complaint satisfy the second prong of the section 552.103 test. We have marked the information that may fall within section 552.103.

We note, however, that much, if not all, of the information you submitted appears to have previously been reviewed by the parties to the anticipated litigation. Specifically, the documents you submitted indicate that a copy of the complaint was provided to the appraiser who is the subject of the complaint. Generally, when parties to litigation already have copies of the records or have inspected them pursuant to discovery or any other means, section 552.103(a) may no longer be invoked. Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation); *see also* Open Records Decision Nos. 551 (1990) at 4, 511 (1988) at 5, 493 (1988) at 2, 349 (1982), 320 (1982). Section 552.103 is intended to protect the discovery process and litigation interests of a governmental body. Open Records Decision No. 551 (1990) at 4. Absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may not withhold under section 552.103 information that has been previously viewed by the parties to the anticipated litigation.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "R. Schmidt", with a stylized flourish at the end.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

¹We note that the applicability of section 552.103(a) ends once the litigation has concluded. *See* Open Records Decision No. 350 (1982) at 3.

RWS/rho

Ref.: ID# 39611

Enclosures: Marked documents

cc: Mr. Carl W. Hayes
McGlinchey Stafford Lang
2727 Allen Parkway, Suite 1900
Houston, Texas 77019
(w/o enclosures)